SECTION 3: CONSULTATION WITH OTHER STATES

Introduction

One of the 1995 Legislature's requests of the Environmental Quality Council set forth in House Joint Resolution 10 was:

> *(2) That the study include but not be limited to a review and analysis of: (D)* ***other states' natural resource and environmental agencies' attempts to improve and measure compliance and enforcement.***

A presentation was made to the EQC which summarized the staff's research on this item. Several attachments were included with the original presentation which are not available here. They were:

- excerpts from a presentation in *The International Conference on Environmental Enforcement,* Amsterdam, Netherlands, 1990, by Carol Wasserman, EPA, Washington, D.C., Office of Enforcement and Compliance Assurance.

- *Policy, Guidance, and Standard Operating Procedures for Oversight of Hazardous Waste Compliance Monitoring and Enforcement Programs*, USEPA Region 8, Nov. 1993.

- *Executive Summary, Prospective Indicators for State Use in Performance Agreements,* State Environmental Goals and Indicators Project, Florida Center for Public Management, August 1995.

- *Summaries of State Environmental Indicator Initiatives with Completed Reports,* State Environmental Goals and Indicators Project, Florida Center for Public Management, Oct 1995.

- excerpts and examples of environmental measurements from the following reports: *Utah Tomorrow Strategic Plan*, 1995; *Strategic Assessment of Florida's Environment (SAFE),* Nov 1994; *Oregon Benchmarks*, Oregon Progress Board, Dec. 1994; *State Agency Strategic Plan*, Wyoming Dept. of Environmental Quality, Sept 1995; *Washington's Environmental Health 1995*, Washington Dept. of Ecology; and *The Montana 305(b) Report*, June 1994, Water Quality Division, Mont. Dept of Health and Environmental Sciences (DEQ).

These attachments are available at the EQC office. The matrix at the end of this section has been proposed by the Environmental Protection Agency for state program performance measurements.

Compliance and Enforcement Improvement and Measurement Methods...Other States

Objective

The Council adopted this goal (Goal 6) for the study:

> *Identify the methods other states use to improve and measure compliance and enforcement with their state natural resource and environmental laws.*

Approach

The EQC staff contacted 13 other states in the Montana region and elsewhere to gather information, focussing on those states using a "benchmark" approach to measuring compliance. Typically, the staff contacted environmental quality agency director's offices and held discussions with directors or their policy advisors.

The staff also contacted nationwide groups such as the Environmental Council of States, National Association of Attorneys General, Environmental Law Institute, Council of State Governments, National Council of State Legislatures, Conference of Western Attorneys General, Florida Center for Public Management, and the federal Environmental Protection Agency.

Results

No Simple Solutions

A search for a universal "thermometer" or yardstick proved fruitless. Each state is grappling with the same issues that confront Montana in evaluating natural resource and environmental programs. The difficulty becomes especially obvious when one measures program efforts and then attempts to relate those efforts to resource or environmental quality. The parameters which are commonly used as yardsticks for measuring compliance and enforcement results include;

- environmental results
- compliance rates
- progress in returning significant violators to compliance
- measures of compliance monitoring
- number of enforcement responses
- timeliness of enforcement responses
- monetary penalties assessed
- measures of technical assistance

A more thorough discussion of the positive and negative attributes for each parameter is available from the EQC office.

Two Separate Efforts

A: "natural resource" and
B: "environmental laws"

Natural resource laws tend to be state specific. Program efforts, goals, and funding are issues left more to the desires of the public and the discretion of the policy makers in each state. These programs are generally organized within a state Department of Natural Resources-type agency with responsibilities for state grasslands, deserts, forests, water quantity, recreation, wildlife, state land use, seashores, and other natural or biological resources unique to each state. As such, laws and goals vary as do accomplishments and the measurements of those accomplishments. So it was not surprising that methods for measuring compliance and enforcement in these natural resource programs were not clearly definable or compartmentalized into a transferable technology. The primary focus of this study review was with the environmental pollution control programs.

Also, with some exceptions, most of the natural resource management programs do not have a very strong compliance and enforcement component. Generally, they seek to manage natural resources by modifying behavior of the public simply by enacting a state policy and providing information and education.

Environmental laws, on the other hand, tend to be state responses to national issues and legislation in the areas of water quality, air quality, solid and hazardous waste management, pesticides, toxics, radiation and others. These programs often do have strong compliance and enforcement components. Generally, they seek to manage the environment by modifying the behavior of business and industry as well as individuals.

Environmental program efforts and goals are not necessarily state originated or designed. With significant grant funding from the federal government through the Environmental Protection Agency, the state's program performance responsibilities have been and still are directed in large part by the EPA. Current percentages of federal EPA funding of these programs are:

Air pollution program	60% federal dollars
Solid waste	75%
Hazardous waste	75%
Toxic substance control	75%
Underground storage tanks	75%
Public water supply	75%
Underground injection wells	75%
Ground water\wellhead protection	100%
Nonpoint source water programs	60%
Superfund remediation	90%
Underground tank remediation	90%
Radon gas programs	50%

These federal grant programs are negotiated with states each fiscal year using a multitude of policy guidance documents developed over the years mostly by EPA. Successful negotiation of each grant for each program results in a State/EPA Agreement which lists the duties and responsibilities of both parties over the course of the grant term.

Integral to these agreements are the performance measures states report to EPA for their various programs. Compliance monitoring and enforcement guidance documents exist for each program, which list EPA's expectations of the state's response action and resolution of violations and the state's plan to require compliance with the program's requirements. Typically then, the methods other states use to improve and measure compliance and enforcement with their environmental laws are fairly standard, having been negotiated with the EPA as a condition for grant funding.

These measures have traditionally tracked program effort or activity, counting things such as the number of inspections conducted; number of violations noted; number of permits issued, suspended, revoked, and denied; number of enforcement actions taken; number of warning letters, administrative orders issued, or civil or criminal cases filed; and the amount of penalties assessed.

Program Improvement

The other component to this study review is to discover what methods are used to improve program compliance and enforcement. Almost universally, states and the federal EPA acknowledge that counting program effort alone is not a satisfactory method of measuring compliance. Activity measurements are important from a program performance and budgeting standpoint if one is trying to match fiscal and human resources to an anticipated workload. However, they may not have a direct link to on the ground environmental measurements.

For example, one can assume that the Los Angeles County Air Pollution Control District would have a very long list of program activity measurements as compared to that from Wyoming. A comparison between the two of number of violations found, number of permits issued, number of inspections conducted, and other program efforts would be heavily weighted toward the California agency. Does that mean that the air quality in Los Angeles is better than it is in Wyoming?

For the last few years, alternative approaches to compliance and enforcement measurement are being discussed and attempted on at least a trial basis. The EPA and some states are developing prototype multi-media Performance Partnership Agreements (PPF) to replace the single media (air, water, waste, etc), single grant State/EPA Agreements. Under these new agreements, federal dollars are provided as "block grants". States are allowed more flexibility in determining where their co-mingled federal grant funds are spent. EPA oversight of state programs is reduced, and states provide the EPA with the compliance and enforcement measures which the states feel are important. States must first provide a self assessment to convince the EPA that their environmental programs are well developed and capable of making continued progress.

Colorado, Utah, Delaware and Illinois have signed these agreements. Eleven other states have expressed interest in participating, including Arizona, Georgia, Indiana, Kentucky, Minnesota, New Jersey, Ohio, Oregon, Texas, Washington, and Wisconsin.

Indicators as Measures

Although not required by the EPA, one of the common components of states involved in the PPF process is program performance measurement through the use of environmental indicators. There seems to be widespread acceptance of the concept that on the ground measurements of environmental results and trends is a more desirable measure of the success of an environmental program than the traditional method of counting program activities. The EPA is sponsoring a State Environmental Goals and Indicators Project conducted by Florida State University which has the following objectives:

- increase the number of state environmental agencies that are effectively utilizing environmental goals and indicators,
- elevate the quality of state agency environmental indicator systems,
- improve the integration of environmental goals and indicators with other environmental management tools, techniques and methodologies, and

- establish a network of policymaking and technical professionals from all state environmental agencies who have a broad interest in environmental management and a specific interest in goals and indicators.

Part of this effort includes an attempt to develop a list of appropriate environmental indicators the states could use to report program progress and success to the EPA. In the future, will the EPA abandon the traditional program activity type reporting in favor of measuring environmental quality indicators? It's not likely that program activity measures will be forsaken, but they are more likely to be supplemented with indicator measurements in an effort to link the two together.

A list of states that have completed an environmental indicators report or have established a process by which to measure environmental conditions is available from the LEPO office. Three states, Connecticut, Minnesota, and Oregon, have benchmark programs which establish desired future goals and then list specific measurable indicators which are intended to help determine whether or not the goals are reached. Examples of program's that use environmental benchmarks and indicators, including Montana's Water Quality Program, were made available for review by the Council.

Compliance Techniques and Philosophy

Most states contacted placed a much stronger emphasis on obtaining compliance through any and all means other than enforcement. Colorado officials define a successful enforcement program as one with the most compliance and least violations rather than the one with the most violations counted or legal actions taken. Oklahoma officials stated that they measure program success in part on how few times they are forced to use a fine. The terms "compliance assistance" and "customer service" were commonly mentioned by states as a philosophy currently receiving increasing emphasis.

Indiana is experimenting with a general facility permit which lists all the environmental requirements the facility is subject to and certifies specifically how the facility proposes to meet them. The Indiana air quality program permits have a money back guarantee if they are not issued within specified time frames. The most common environmental violations in each program are identified and workshops are held with the regulated communities to explain how best to comply.

Colorado is entering into a Performance Partnership Agreement with the EPA this year which emphasizes three components: compliance assistance, pollution prevention, and customer service.

Utah created a temporary air pollution permit amnesty program when it discovered significant noncompliance by the regulated community and learned that the fear of penalty for not applying by the original deadline was the major reason for noncompliance. Program staff are also making a concerted effort to act as "mini-consultants" to small businesses which can't afford to hire others to help them through technical permit or compliance processes.

Education programs in schools, media efforts, sponsored workshops conducted by industry trade associations, on site walk-through audits (as opposed to enforcement inspections) by staff were mentioned often. Pollution prevention programs are emphasized in all states contacted.

Voluntary self-auditing of permitted businesses was mentioned as an incentive to obtain compliance. The incentive to conduct audits and correct violations is the agency's grant of immunity, partial immunity, and/or the provision of privilege which allows audit discoveries to remain private.

The EPA is also trying to provide alternative methods intended to obtain environmental compliance. Within the last two years, the EPA has issued a new *Policy on Flexible State Enforcement Response to*

Small Community Violations, Clean Air Sec. 507 Small Business Assistance Program Enforcement Response Policy, and the *Small Business Compliance Incentives Policy*. All are intended to de-emphasize the enforcement role of state and federal programs and encourage flexibility in obtaining cooperative compliance.

Outside the United States, Norway has a policy of inspecting some industries more than others. They are identified as class 1 through 4 depending on their actual or potential emissions, their toxicity, and the environmental sensitivity of the surrounding area (human receptors, biological receptors, air, water or soils). Industries pay standard fees for the inspections, with follow-up inspections costing more. Also, an effort to develop, train and use industry specific inspectors is being attempted. For example, there are inspectors for the refinery industry who can advise, inspect, train, and otherwise relate to the industry for all environmental parameters: air, water, waste, etc.

Summary

Other states are having similar difficulties in measuring compliance and enforcement within their natural resource and environmental laws. No universal study could be found which provided a methodology that worked differently or any better than what is in use today. The federal EPA and the states have a long history of negotiating what the terms "timely, appropriate, and effective" compliance and enforcement mean. The measurements have traditionally been quantitative counts of program efforts. These are relatively easy to measure and provide numbers which can be used to make management decisions. The Council received this type of information in the course of the agency presentations.

The need to provide some measure of environmental quality is currently being discussed in state and federal programs. Qualitative measurements of environmental conditions and trends through some defined and measurable environmental indicators are receiving more emphasis as a methodology. This is a national planning effort which may or may not go forward over the next several years. Several states have proceeded on their own. The efforts are new and do not yet show strong environmental trends. The link between the two--program compliance and enforcement activity counts and environmental quality--while apparent, can be very difficult to measure.

EPA OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM PERFORMANCE MEASURES

The Washington D.C. EPA Office of Enforcement and Compliance Assurance (OECA), after working with the states and specific EPA pollution control programs has developed the following "Top 10" list of state program performance measurements for use in those states negotiating a Performance Partnership Agreement (PPA) with EPA for FY 1996. Montana has not entered into a PPA with the EPA but is still operating its programs under the terms of the State\EPA Agreement format. The measures listed below are a mixture of (activity\bean counting) and outcome (environmental indicators\goals) measurements. This is a work in progress and will be modified with experience.

#	MEASURES	PURPOSE	ROLES & REQUIREMENTS
1	Compliance rates by industry sectors and by media (air, water, waste, etc.)	To measure industry compliance and effectiveness of state\EPA enforcement and compliance activities.	State role; Continue to provide facility specific compliance information through automated data systems. EPA role; Produce semi-annual analysis identifying compliance rates by sectors and media for state. Comments; No new reporting requirement for state.
2	Significant noncompliance (SNC) rates by industry sector and by media.	To measure industry noncompliance and effectiveness of state\EPA enforcement and compliance activities.	State role; Continue to provide facility specific compliance information through automated data systems. EPA role; Produce semi-annual analysis identifying SNC rates for sectors and media for state. Comments; No new reporting requirements for state.
3	Number of inspections conducted by state.	To measure use of compliance monitoring as a tool for ensuring compliance.	State role; Continue to provide facility specific data on EPA negotiated inspections through automated data systems. Also provide number of additional state inspections by media and sector. EPA role; Produce semi-annual analysis of inspections conducted by states, identifying number of inspections conducted by industry sectors and as a percentage of total universe. Comments; No new reporting for EPA negotiated inspections. *New reporting requirements for state inspections by industrial sectors and by media.*
4	Number of administrative enforcement actions, number of civil judicial, and number of criminal actions (a) initiated by each media, and (b) concluded for each media.	To measure use of enforcement actions as a tool for ensuring compliance.	State role; Continue to provide facility specific enforcement activity through automated data system for (a). Report (b) through national data system at option of state. EPA role; Produce semi-annual analysis identifying number of each type of enforcement action initiated by media and the number concluded where state does reports for state. Comments; *Data on concluded cases is new reporting requirement* AND IS OPTIONAL.

#	MEASURES	PURPOSE	ROLES & REQUIREMENTS
5	Describe up to ten state enforcement settlements in which innovative Supplemental Environmental Projects (SEP's) or injunctive relief are utilized.	To identify innovative state enforcement settlements.	State role; Provide a narrative description of innovative settlements for FY 1996 at OPTION OF STATE. EPA role; Share innovative examples with all states. Comment; Allows states the opportunity to describe innovation and environmental benefits of selected enforcement settlements.
6	Average time (for each media) needed by state either to return significant violator to compliance or to issue enforceable compliance plan (starting from identification of violation).	To measure timeliness of efforts to achieve compliance.	State role; Continue to provide facility specific data on compliance status and enforcement activity through automated data system. EPA role; Produce semi-annual analysis identifying average time by media for state. Comments; Does not replace existing media specific SV\T&A policies.
7	Percent of significant violators in each media that have new or recurrent significant violations within two years of receiving a formal enforcement action.	To identify recurrent patterns of noncompliance.	State role; Continue to provide facility specific data on compliance status and enforcement activities through automated data systems. EPA role; Produce annual analysis of national patterns of recurrent noncompliance. Comments; No additional reporting requirements.
8	Reduction in pollutant emissions, discharge loading, and improperly managed substances achieved by state through enforcement settlements-including SEP's and injunctive relief.	To demonstrate environmental benefits resulting from enforcement activities.	State role; Develop annual analysis of benefits achieved from enforcement settlements. EPA role; Share result of EPA FY 1995 pilot test for federal cases. (one state is also conducting a pilot test of this measure for their cases). EPA will provide prototype data collection form and software. Comments; *new data requirement for this measure*.

#	MEASURES	PURPOSE	ROLES & REQUIREMENTS
9	Describe state's compliance assistance program including; the types of assistance provided; the number and percent of facilities in industry sectors assisted through each type; and an evaluation of effectiveness using available data.	To evaluate effectiveness of compliance assistance as a tool for ensuring compliance.	State role; Provide a narrative description of state's compliance assistance program for FY 1996. EPA role; Share information with all states. Comments; Enhances needed national dialogue about compliance assistance methods and effectiveness.
10	Percent of facilities seeking assistance under the Interim Policy on Compliance Incentives for Small Business, which complied within the requisite correction period (180 days or 360 days with pollution prevention).	To measure effectiveness of compliance assistance as a tool for small business compliance.	State role; Develop annual analysis providing percentage by sector. EPA role; EPA will use state data to evaluate effectiveness of policy and determine if policy will be extended or modified. Comments; *Mandatory only for states using this policy* and adopting its correction period option.